Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WILLIAM MONTANINO, JR.,
Specialist, United States Army,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the rulings of the judge and the courts of appeals required petitioner, who previously had formed an attorney-client relationship with appointed counsel, to make decisions concerning fundamental and constitutional rights at a critical stage of trial without consultation with or assistance from counsel?

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, William Montanino, Jr., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Military Appeals [now the United States Court of Appeals for the Armed Forces] entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 40 M.J. 364 (C.M.A. 1994) (Appendix A). The opinion of the United States Army Court of Military Review is reported at 35 M.J. 565 (A.C.M.R. 1992) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 19, 1994, affirming petitioner's conviction, dated April 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. 1992).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Constitution of the United States provides in pertinent part:

> *Amendment VI.* In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State or district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.
>
> *Amendment XIV, Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The following provision of the Uniform Code of Military Justice is involved in this case:

> *Article 39(a), UCMJ, 10 U.S.C. § 839(a).* At any time after the service of charges which have been referred for trial to a court-martial composed of a

> military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of—
>
> (1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;
>
> (2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;
>
> (3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and
>
> (4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.
>
> These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made part of the record. . . .

Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707, is set out in Appendix C.

STATEMENT OF THE CASE

On September 6, 1990, court-martial charges were preferred against Specialist Montanino for being absent without leave and for committing larceny. Court-martial jurisdiction was invoked pursuant to Article 2, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 802. Captain Seitsinger, a qualified and certified defense counsel, was detailed by Captain Gregory Coe, the senior defense counsel at Fort Drum, New York, to represent

petitioner at court-martial. Captain Seitsinger formed an attorney-client relationship with Specialist Montanino; he held numerous conferences with Specialist Montanino and represented him at the preliminary hearing conducted on September 26, 1990, pursuant to Article 32, UCMJ, 10 U.S.C. § 832.

On November 12, 1990, Captain Seitsinger was ordered to deploy to the Sinai, Egypt, as part of a Multinational Forces and Observers Task Force. (R. at 3.) The charges against Specialist Montanino were referred to trial by general court-martial on December 4, 1990.

On December 17, 1990, Specialist Montanino appeared in court for a pre-trial hearing conducted under the auspices of Article 39(a), UCMJ, 10 U.S.C. § 839(a). Although Specialist Montanino had a statutory right to counsel at the hearing pursuant to Article 39(a), UCMJ, his appointed counsel was not present. Captain Coe was present, but made it clear that he did not represent Specialist Montanino. (R. at 3.) After the judge advised petitioner of his rights to counsel, Specialist Montanino stated that he wanted Captain Seitsinger and nobody else to serve as his defense counsel. (R. at 6.) Captain Coe informed the judge that Captain Seitsinger was due back from the Sinai during the first week of March, 1991. At this pre-trial hearing at which petitioner had no counsel, Specialist Montanino expressly stated in response to questioning by the judge that he was willing to wait until March for Captain Seitsinger to return and for trial to begin.

Captain Seitsinger returned from the Sinai, and petitioner was arraigned on March 7, 1991. Following arraignment, the defense moved to have the charges dismissed for lack of speedy trial required by Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial [hereinafter R.C.M.] 707. A new judge, who had not presided over the earlier pre-trial session, denied the

motion, concluding that the delay from December 17, 1990, until March 7, 1991, was occasioned by the accused because of his willingness to wait until Captain Seitsinger returned from the Sinai.

In the military justice system, R.C.M. 707 requires that, for speedy trial purposes, an accused be brought to trial within 120 days after notice to the accused of preferral of charges. Rule for Courts-Martial 707(c), however, provides for certain periods to be excluded when determining whether the 120 day period has expired. Accordingly, at trial and on appeal, the key issue in this case became whether the time period from December 17, 1990, through March 7, 1991, was excludable time. If the period was attributable to the defense, it could be excluded under R.C.M. 707(c) and the petitioner's speedy trial rights would not have been violated. However, if this period of time was not excludable, the charges would have to be dismissed because 182 days would have passed from preferral of charges, September 6, 1990, until arraignment, March 7, 1991.

On appeal, both the Army Court of Military Review and the United States Court of Military Appeals agreed with the military judge and ruled that the speedy trial rights of petitioner were not violated because Specialist Montanino affirmatively consented to the delay. The Court of Military Appeals ruled that Specialist Montanino could have protected his speedy trial rights at the pretrial hearing where he was unrepresented by counsel by requesting "that his trial proceed in a timely fashion *and* that he be represented by Captain Seitsinger". *United States v. Montanino,* 40 M.J. 364, 366 (C.M.A. 1994) (emphasis added) (Appendix A). There is no mention in the opinion or in the record in this case, however, of how petitioner could have been aware that he could have asserted both rights.

REASONS FOR GRANTING THE WRIT

The Court of Military Appeals has decided an important speedy trial issue at the expense of petitioner's constitutional right to counsel. The Court of Military Appeals' treatment of this constitutional issue conflicts with prior judgments of this Court, with judgments of the Courts of Appeals in almost every other circuit, and with federal statute. The troubling aspect of the decision is that it forces an accused, unrepresented by counsel at a critical stage of trial, to make decisions which, in effect, waive important rights. The Court of Military Appeals has ruled that Specialist Montanino, a non-lawyer, could protect his rights in this case by requesting that his trial proceed in a timely fashion, despite the fact that Specialist Montanino was never informed of this right and had no access to counsel when making his decision. Furthermore, the decision allows an uninformed accused to waive fundamental rights without consultation with counsel and without waiving the right to counsel.

Two aspects of this decision directly contradict prior judgments of this Court. First, Specialist Montanino was required to appear without the assistance of counsel at the pre-trial hearing. Such an appearance violates this Court's guidance that, under the Sixth Amendment, defendants in criminal proceedings are entitled to the assistance of counsel at all critical stages of the proceedings against them, unless the right is waived. *United States v. Wade,* 388 U.S. 218, 226 (1967). In this case, Specialist Montanino appeared at the proceeding and never waived his right to counsel.

Second, the opinion of the Court of Military Appeals denied petitioner the "guiding hand of counsel" at a critical stage of the proceedings against him. *Geders v. United States,* 425 U.S. 80 (1976). The Court of Military Appeals foists upon Specialist Montanino the burden of requesting that his trial proceed in a timely fashion, and

expects him, an unknowing accused, to make the request at a hearing where he has no counsel.

Both aspects of the lower court's decision are inconsistent with the Sixth Amendment of the Constitution. In the mind of unrepresented Specialist Montanino, one right (speedy trial) had to be surrendered in order to procure the right to assistance of counsel. The option posited by the Court of Military Appeals, requesting that both rights be preserved, was simply unavailable to Specialist Montanino: he was ill-equipped to deal with the complexities of the courtroom without his lawyer's guidance.

The Sixth Amendment guarantees each member of society the guidance of counsel at all critical stages of a trial. Accordingly, this Court should issue its writ and review the holding of the Court of Military Appeals to review not only the grave injustice done to Specialist Montanino, but also to explain the major doctrinal lines that will clarify prior holdings and affect future development.

I. THE PORTION OF THE PRE-TRIAL HEARING WHICH EXTENDED BEYOND SPECIALIST MONTANINO'S ELECTION OF COUNSEL VIOLATED HIS CONSTITUTIONAL RIGHTS TO THE ASSISTANCE OF COUNSEL AT CRITICAL STAGES OF PROCEEDINGS.

Under the Sixth Amendment, defendants in criminal proceedings are entitled to the assistance of counsel at all critical stages of the proceedings against them. *United States v. Cronic*, 466 U.S. 648, 659 (1984); *United States v. Wade*, 388 U.S. 218, 226 (1967). In *Wade*, the Court explained that counsel's presence was necessary at any stage of the proceedings "where counsel's absence might derogate from the accused's right to a fair trial." *Wade*, 388 U.S. at 226. Applying this test, the Court has held that "critical stages" include pretrial hearings "where

certain rights may be sacrificed or lost." *Coleman v. Alabama*, 399 U.S. 1, 7 (1970) (citing *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961)).

The key analysis in determining whether a hearing is a critical stage is "whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and *the ability of counsel to help avoid that prejudice*." *Coleman*, 399 U.S. at 9 (citing *Wade*, 388 U.S. at 227) (emphasis added). Exposing the facts of the present case to this analysis reveals that the pretrial Article 39(a) session was a critical stage in the proceedings.

Specialist Montanino concedes that the original intent of the hearing, to address his right to counsel, was not critical under the *Coleman-Wade* analysis. Once Specialist Montanino elected representation by Captain Seitsinger, however, the hearing should have been terminated. Effectively compelling Specialist Montanino to request a defense delay and waive his speedy trial rights elevated the hearing to a critical stage where the presence of counsel was mandated. The unknowing waiver of petitioner's speedy trial rights indisputably would have been avoided by the presence and advice of an attorney. Thus, because a right was irretrievably lost by Specialist Montanino's responses at this hearing, it was a critical stage of trial which required the presence of counsel. *Hamilton*, 368 U.S. at 54.

Further, Article 39(a), 10 U.S.C. § 839(a), provides that the presence of defense counsel is required, in order for the hearing to be held. Therefore, once Specialist Montanino elected to be represented by his appointed counsel, Captain Seitsinger, that pretrial hearing should have been terminated. To force Specialist Montanino to continue in the hearing unrepresented, particularly given the fact that Captain Seitsinger's absence was caused by order of the government, is contrary to statute and cannot be condoned.

This Court has steadfastly found constitutional error without any showing of prejudice where counsel was either absent or completely prohibited from assisting an accused during a critical stage of trial. *See, e.g., Geders v. United States,* 425 U.S. 80 (1976); *Herring v. New York,* 422 U.S. 853 (1975); *Brooks v. Tennessee,* 406 U.S. 605 (1972); *Ferguson v. Georgia,* 365 U.S. 570 (1961). Where, as here, important rights are forfeited by an unknowing defendant absent the assistance of knowledgeable counsel, the result is the denial of a defendant's right to due process and right to assistance of counsel.

Specialist Montanino never waived his right to counsel at this hearing; in fact, he invoked the right by informing the judge that he already had an attorney-client relationship with Captain Seitsinger and desired his representation. Once the request for counsel was made known, the judge violated Specialist Montanino's Sixth Amendment and statutory rights by proceeding in the absence of counsel. The judge had two choices, neither of which would have violated petitioner's constitutional rights: the judge could have delayed any further proceedings immediately after ascertaining Specialist Montanino desired counsel who was absent, or the judge could have directed detail of another counsel. Rather than choosing one of these options, the judge continued into a critical stage of the proceedings and secured what has heretofore been held to be a waiver of petitioner's right to a speedy trial under the Manual for Courts-Martial.

II. THE RULE ESTABLISHED BY THE COURT OF MILITARY APPEALS DECISION IN THIS CASE DEPRIVES DEFENDANTS OF THEIR SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Under the logic of the Court of Military Appeals' decision, an accused at a judicial hearing may be forced to make decisions concerning fundamental rights without the

assistance of appointed counsel. This logic, however, is contrary to the reasoning behind this Court's opinion in *Geders v. United States*, 425 U.S. 80 (1976), and *Strickland v. Washington*, 466 U.S. 668 (1984). In *Geders*, the defense counsel and the defendant were given instructions to not discuss "anything" about the case with one another during an over-night recess. *Id.* at 82-83. The Fifth Circuit affirmed. This Court unanimously reversed, holding that the trial judge's ruling deprived defendant of the "guiding hand of counsel" at a critical point in the proceeding. *Id.* at 89. Because of the overriding importance of the assistance of counsel to a criminal defendant, the Court found the judge's order could not be upheld. *Id.* at 91.

In *Strickland*, prior to addressing the proper standards for measuring the quality of an attorney's work, the Court addressed governmental interference with the right to counsel. The Court stated that the "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make decisions about how to conduct the defense." *Strickland*, 466 U.S. at 686 (citations omitted). Applying this statement to the facts in this case, the government violated Specialist Montanino's right to the effective assistance of counsel by completely denying his lawyer the opportunity to conduct his defense, and instead requiring petitioner to appear in a judicial forum and make fundamental decisions about his defense without the advice and assistance of counsel.

Particularly relevant to this issue is the reasoning behind the Court's decision in *Geders*. In discussing the importance of the assistance of counsel, the Court noted:

> Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance. The right to be heard would be, in many cases, of little avail if it

> did not comprehend the right to be heard by counsel. . . . [A defendant] is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Geders, 425 U.S. at 88-89 (citing *Powell v. Alabama*, 287 U.S. 45, 68 (1932)). Consequently, the denial of access to counsel violated the Sixth Amendment's guarantee of effective assistance of counsel.

The message of *Geders* and subsequent cases which have liberally construed it is clear: a trial court may not restrict the function of counsel by placing a blanket prohibition, no matter how brief, on attorney-client communications during recesses at trial. For example, courts have extended the holding to strike down orders restricting all discussion between attorney and client during a one hour lunch recess, *United States v. Conway*, 632 F.2d 641 (5th Cir. 1980), and during brief, routine recesses during trial. *United States v. Allen*, 542 F.2d 630 (4th Cir. 1976), *cert. denied*, 430 U.S. 908 (1977).

This line of analysis is conspicuously absent from the Court of Military Appeals opinion in the present case. Instead, the decision required petitioner to forego assistance of counsel by forcing him to make an immediate decision concerning his right to a speedy trial without "the guiding hand of counsel." Although this was not a direct prohibition on communication as in *Geders*, the interference with Sixth Amendment rights was equipotent.

Geders and *Strickland* are grounded in the important role of counsel to a criminal defendant. The decision of the Court of Military Appeals, that the ill-equipped petitioner made a knowing and voluntary choice to waive his rights to speedy trial, completely ignores the constitutional legacy of *Geders*.

A defendant in a criminal case must often consult with his attorney before making fundamental decisions at trial. *Geders*, 425 U.S. at 88. In the present case, the prohibition on consultation was the requirement that Specialist Montanino make a decision on his right to a timely trial without consultation with his attorney who was in the Sinai, Egypt. Specialist Montanino answered the judge's questions at the pre-trial hearing and thereby waived an important right that could have required dismissal of the charges against him. The denial of consultation before making this decision was a prohibition on attorney-client contact during an important judicial hearing; as such, the prohibition denied Specialist Montanino his constitutionally assured effective assistance of counsel. Accordingly, the Court of Military Appeals decision in this case is inconsistent with the Sixth Amendment to the Constitution.

CONCLUSION

The decision below, while novel in its reasoning, presents a substantial departure from clearly established law construing a defendant's rights under the Sixth Amendment. The effect of the Court of Military Appeals' decision is insidious: by forcing petitioner to participate and make fundamental decisions in a critical stage of the proceedings against him, the Court of Military Appeals has abrogated Specialist Montanino's right to the effective assistance of counsel. Moreover, the decision essentially requires an accused to proceed in a *pro se* status without requiring a waiver of assistance of counsel.

The decision and its ramifications clearly violate this Court's holdings in *Johnson v. Zerbst*, 304 U.S. 458 (1938) (defendant must provide "intelligent and competent waiver" of right to counsel before being permitted to proceed *pro se*), *United States v. Wade* and *Geders v. United States*. The fundamental nature of the error in this case strikes at the very heart of our adversary system.

This Petition for Writ of Certiorari should, therefore, be granted.

Respectfully submitted,

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December 1994

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 93-0941

CMR No. 9100802

UNITED STATES,

Appellee,

v.

WILLIAM MONTANINO, JR.,
Specialist, U.S. Army,

Appellant.

Argued May 5, 1994

Decided Sept. 19, 1994

Opinion of the Court

COX, Judge:

A military judge sitting alone as a general court-martial convicted appellant, pursuant to his pleas, of absence without leave and wrongful appropriation of government funds; and, contrary to his pleas, of larceny (two specifications), in violation of Articles 86 and 121, Uniform Code of Military Justice, 10 USC §§ 886 and 921, respectively. The approved sentence provides for a bad-conduct discharge, confinement for 11 months, and reduction to the lowest enlisted grade. The Court of Military Review affirmed the findings and sentence. 35 MJ 565 (1992). We granted review of the following issue:

WHETHER THE MILITARY JUDGE ERRED BY NOT DISMISSING THE CASE AGAINST [APPELLANT] BECAUSE HE WAS NOT BROUGHT TO TRIAL WITHIN 120 DAYS.

On September 6, 1990, charges were preferred against appellant. Captain C, the senior defense counsel at Fort Drum, New York, detailed Captain S to be appellant's defense counsel. After conducting "numerous conferences" with appellant and representing him through the investigation under Article 32, UCMJ, 10 USC § 832, Captain S was assigned to temporary duty with the Multinational Force and Observers (MFO) in the Sinai Desert. Captain S deployed to that assignment on November 12, 1990.

On December 17, 1990, a session under Article 39(a), UCMJ, 10 USC § 839(a), was conducted for the purpose of determining appellant's choice of counsel. Captain C represented appellant at the hearing, but expressly stated that he had not detailed himself as appellant's defense counsel. When questioned by the military judge as to whom he wished to represent him at trial, appellant responded, "Captain [S]." Captain C then informed the court that Captain S was not scheduled to return from the Sinai until March 1991. Upon questioning by the military judge, appellant expressly stated he was willing "to wait until March" to begin trial. The Government argued against the delay, however, maintaining that it was prepared to proceed to trial at that time. Accordingly, the Government requested that the military judge declare Captain S unavailable in accordance with Army Regulation (AR) 27-10, and that substitute counsel be appointed to represent appellant. The military judge denied the Government's request, stating:

> [T]he U.S. government sent him there, and . . . can bring him back. [U]ntil the U.S. government makes some effort to get him back and fails in that effort,

> I'm not prepared to say that . . . [Captain S is] unavailable and that substitute counsel needs to be appointed. . . . I'm not prepared to say that he's unavailable because I'm not sure anyone here has told me that if requested, that he wouldn't be returned for whatever it takes to try the case. . . .

Although he saw no basis to appoint separate counsel, the military judge concluded that the delay until March was occasioned by the defense because of appellant's willingness to postpone the trial until Captain S returned from the Sinai.

Captain S returned from the Sinai in late February 1991, and the trial resumed in early March, when appellant was arraigned but did not enter pleas. At defense request further proceedings were delayed until April 1, 1991, before a different military judge. At the April session, Captain S moved to have the charges dismissed for lack of speedy trial, pursuant to RCM 707, Manual for Courts-Martial, United States, 1984. In denying appellant's motion, the new military judge stated:

> It's clear to me, abundantly, beyond reasonable doubt that this was a defense delay in this case. The initial assignment of the defense counsel to the Montanino case occurred before, according to the testimony of Captain [C], occurred well before there was any hint of a defense counsel having been—or having had to go with the Force to the Sinai. The selection, therefore, of Captain [S] to go to the Sinai, knowing full well that he had undertaken active responsibility for—or even probable responsibility for a potential GCM case, is a burden that must rest with the Trial Defense Service.
>
> The Trial Defense Service cannot abdicate its responsibility to its client simply by saying that they've been assigned to Task Forces in the Sinai or sent

> overseas. And, in this case, the defense counsel remained actively assigned to the U.S. Army Trial Defense Service throughout that entire period, even though he might have been attached to Task Force 2/14. And, I find it a very hard argument to believe, and I do not accept it, that the Trial Defense Service can simply say, "It's a government responsibility to bring this defense counsel back," not taking any— and then sitting back and reaping the benefits of any possible delay in courts-martial cases.
>
> * * *
>
> Moreover, the accused on at least two separate occasions, indicated that he wished to remain represented by Captain [S] and Captain [S] alone. And, based upon those general findings, this delay is defense delay.

Additionally, the military judge determined the delay was excludable under RCM 707(c)(9) (Change 3), as "delay for good cause" based on "unusual operational requirements and military exigencies."

The *Government* bears the burden of bringing an accused to trial in a timely manner. *United States v. Cook,* 27 MJ 212, 215 (CMA 1988); RCM 707. Under the version of RCM 707(a) in effect at the time of appellant's trial (Change 3), an accused had to be brought to trial within 120 days of notice to the accused of preferral of charges. This mandate is not without exception however. The 120-day statutory period is tolled for "[a]ny period of delay resulting from a delay in a proceeding or a continuance in the court-martial granted at the request or with the consent of the defense." RCM 707(c)(3). Failure by the Government to comply with the requirements of RCM 707 "result[s] in dismissal of the affected charges upon timely motion by the accused." RCM 707(e).

The Court of Military Review found that the Government did not present "sufficient facts" to enable that court to determine "if the deployment" of Captain S "to the Sinai qualified as an 'unusual operational requirement' or 'military exigency.' " 35 MJ at 567. We have no quarrel with that determination. Although the record suggests that Captain S's presence in the Sinai might have been of an exigent nature, this was not conclusively established. It is unclear whether Captain S could have returned from the Sinai at an earlier date, had the request been made to the proper authorities.

In any event, appellant explicitly agreed to postpone his trial until March 1991, so he could retain Captain S as his defense counsel. Despite this express waiver of his regulatory, speedy-trial rights, appellant contends that the 3-month delay should not be slated as a defense delay because he essentially "was given a Hobson's choice: either he could exercise his right to be represented by detailed counsel with whom he had formed an attorney-client relationship or he could assert his right to a speedy trial, but not both." Final Brief at 10-11.

In our view, appellant's options were not so limited. He could have requested that his trial proceed in a timely fashion *and* that he be represented by Captain S. If this had been the case, it would have been incumbent on the Government to either effect Captain S's timely return from the Sinai or prove he was not "reasonably available" in accordance with Article 38(b)(3)(B), UCMJ, 10 USC § 838(b)(3)(B).[1] Because appellant voluntarily agreed to the delay, however, the Government was not put to this task. Accordingly, we hold the military judge was correct in ruling the postponement was a defense delay and that

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[1] *See also United States v. Hanson*, 24 MJ 377, 379 (CMA 1987) ("Once counsel has been detailed and an attorney-client relationship established, that relationship may only be severed for good cause shown.").

appellant was not entitled to a dismissal of the charges against him.[2]

The decision of the United States Army Court of Military Review is affirmed.

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[2] We are concerned by the fact that appellant was not represented formally by counsel at the December 17 session under Article 39(a). Uniform Code of Military Justice, 10 USC § 839(a). We see no real reason why another member of the Trial Defense Service could not actually participate in the decision whether to go to trial. These are administrative matters which can be readily handled by any competent lawyer.

Chief Judge SULLIVAN and Judges CRAWFORD and GIERKE concur.

WISS, Judge (dissenting):

The majority does fine, in my view, until the penultimate paragraph in which it holds to the ultimately destructive fire the feet of a lay defendant, unrepresented by defense counsel, who had no earthly idea that he could insist on both a speedy trial and representation by the defense counsel with whom he had an existing attorney-client relationship, Captain Seitsinger. In fact, I do not read in the record at all any mention to appellant at the critical session under Article 39(a), Uniform Code of Military Justice, 10 USC § 839(a), on December 17, 1990, that he had any sort of speedy-trial right—much less the particulars of that right and that a majority of this Court years down the road might deem that he effectively had waived it by saying he was willing to wait for Captain Seitsinger to return to represent him. I have no idea how the majority finds a knowing and intelligent waiver from these facts.

Anyway, I am not at all sure that appellant lawfully can be held to any purported "request" at that session, given the absence from that session of his defense counsel and the ambiguous-at-best status of Captain Coe. Article 39(a) specifically provides that proceedings under its provisions "shall be conducted in the presence of the accused, the defense counsel, and the trial counsel. . . ." Further, RCM 803, Manual for Courts-Martial, United States, 1984, stipulates that sessions under Article 39(a) "shall be conducted in the presence of the accused, defense counsel, and trial counsel in accordance with RCM 804 and 805. . . ."

Finally, RCM 805(c) does permit a court-martial session to proceed "[a]s long as at least one qualified counsel for each party is present. . . . An assistant counsel who

lacks the qualifications necessary to serve as counsel for a party may not act at a session in the absence of such qualified counsel." The Discussion following RCM 805 states:

> Ordinarily, no court-martial proceeding should take place if any defense or assistant defense counsel is absent unless the accused expressly consents to the absence. The military judge may, however, proceed in the absence of one or more defense counsel, without the consent of the accused, if the military judge finds that, under the circumstances, a continuance is not warranted and that the accused's right to be adequately represented would not be impaired.

Nothing in this record satisfies me that these provisions were obeyed. In fact, the majority acknowledges in footnote 2 "that appellant was not represented formally by counsel at the December 17 session under Article 39(a), ..." I am at a loss to understand how, legally or logically, an unrepresented accused can be held to have made a sensitive balance between competing legal rights (and, indeed, to have recognized that they may not even be competing).

This is not a case of sharp practice or questionable maneuvering to "create" a defense objection through dilemma. *Cf. United States v. Burris*, 21 MJ 140 (CMA 1985). Neither is there any hint that defense counsel was involved in any action that would mislead or inadvertently deceive the Government into delaying the trial to result in a violation of the speedy-trial requirements. *Cf. United States v. Givens*, 30 MJ 294 (CMA 1990); *United States v. Carlisle*, 25 MJ 426 (CMA 1988). Nor is there evidence that appellant was asserting his right to counsel as a ploy to convert a procedural protection into a sword with which to attack the Government for failing to bring him to trial timely. *See United States v. King*, 30 MJ 59 (CMA 1990); *United States v. Cherok*, 22 MJ 438 (CMA 1986).

In fact, as the majority notes, ironically trial counsel resisted delay to await Captain Seitsinger's return; curiously, the military judge chose to rely upon the uncounseled and uninformed decision of appellant that he was willing to wait. No mention was made, however, of how to reconcile *both* of appellant's rights—or even that he *had* both rights.

On this bizarre record, I am unable to find defense "waiver" or defense "request for delay" or whatever it is that the majority latches onto, to the detriment of an apparently sincere and unrepresented accused. Rules are not made so that the defense can twist and manipulate them to the point where justice is distorted; neither are they made so that an unaware and unwary lay accused can be tricked into forfeiting what then, at least, was an important right to speedy trial. *Cf. United States v. Kossman*, 38 M.J. 258, 262 (CMA 1993) (Wiss, J., dissenting).

APPENDIX B

U.S. ARMY COURT OF MILITARY REVIEW

ACMR 9100802

UNITED STATES,
Appellee,

v.

SPECIALIST WILLIAM MONTANINO, JR.,
509-68-7024, United States Army,
Appellant.

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31 July 1992

Before JOHNSON, WERNER, and GRAVELLE, Appellate Military Judges.

OPINION OF THE COURT

GRAVELLE, Judge:

Pursuant to mixed pleas, the appellant was found guilty by a military judge sitting as a general court-martial of unauthorized absence, wrongful appropriation, and two specifications of larceny, in violation of Articles 86 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 921 (1982) [hereinafter UCMJ]. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for eleven months, and reduction to Private E1.

The appellant asserts two errors on appeal. First, he asserts that he was denied his right to a speedy trial under R.C.M. 707 [1] because he was not brought to trial within 120 days of notification of preferral of charges. Second, he asserts that the evidence is legally and factually insuffi-

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[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707 [hereafter R.C.M.].

cient to support the findings of guilty of the two specifications of larceny. We disagree with both assertions.

Captain (CPT) S represented the appellant through the Article 32, UCMJ, investigation and was then selected by CPT C, the installation senior defense counsel, and by the U.S. Army Trial Defense Service for temporary duty in the Sinai Desert as part of the Multinational Forces and Observers (MFO) task force. After CPT S had deployed in November 1990, CPT C, while expressly not detailing himself as the appellant's defense counsel, represented the appellant at an Article 39(a), UCMJ, session held in December for the limited purpose of determining the appellant's choice of counsel. At that session, the appellant elected to be represented exclusively by CPT S, even after learning that CPT S would not return until March 1991. When asked specifically by the military judge if he was willing to wait until March for CPT S, the appellant answered in the affirmative. The trial counsel argued against the delay and stated that he was ready to proceed to trial at that time. The military judge ruled that the delay until March was a defense delay.

When the trial resumed in April 1991 before a different military judge and with CPT S as the appellant's defense counsel, CPT S moved for dismissal of charges for a violation of the "120 day rule" of R.C.M. 707.[2] After hearing the testimony of CPT C the senior defense counsel, regarding the detailing of CPT S to the MFO mission, and after considerable finger-pointing as to whose responsibility it was for returning the defense counsel to the situs of trial, the military judge found that:

> It's clear to me, abundantly, beyond reasonable doubt that this was a defense delay in this case. The initial assigment [sic] of the defense counsel to the Montanino case occurred before, according to the testi-

[2] There was a defense-requested delay between 17 March and 1 April. This defense delay is not in dispute in this case.

> mony of [CPT C, the senior defense counsel], occurred well before there was any hint of a defense counsel having been—or having had to go with the Force to the Sinai. The selection, therefor [sic], of [CPT S] to go to the Sinai, knowing full well that he had undertaken active responsibility for—or even probable responsibiliy for a potential GCM case, is a burden that must rest with the Trial Defense Service.
>
> The Trial Defense Service cannot abdicate its responsibility to its client simply by saying that they've been assigned to Task Force [sic] in the Sinai or sent overseas. And, in this case, the defense counsel remained actively assigned to the US Army Trial Defense Service throughout that entire period, even though he might have been attached to Task Force 2/14. And, I find it a very hard argument to believe, and I do not accept it, that the Trial Defense Service can simply say, "It's a government responsibility to bring this defense counsel back," not taking any—and then sitting back and reaping the benefits of any possible delay in courts-martial cases.
>
> . . . .
>
> Moreover, the accused on at least two separate occasions, indicated that he wished to remain represented by Captain [S] and Captain [S] alone. And, based on those general findings, this delay is defense delay.

Additionally, the military judge found that the delay was excludable under R.C.M. 707(c)(9) as delay for good cause based on unusual operational requirements and military exigencies.

It is the *government* that bears the burden of bringing an accused to trial in a timely manner. *United States v. Cook*, 27 M.J. 212 (C.M.A.1988); R.C.M. 707. Under the version of R.C.M. 707 in effect at the time of trial,

an accused must be brought to trial within 120 days after notification of preferral of charges. R.C.M. 707(a). Periods of time that may be excluded from the government's accountability under this rule include delays "in a proceeding or a continuance in the court-martial granted at the request or with the consent of the defense." R.C.M. 707(c)(3). Also excluded is "[a]ny other period of delay for good cause, including unusual operational requirements and military exigencies." R.C.M. 707(c)(9). Failure to comply with the speedy trial requirements of this rule shall result in dismissal of the affected charges upon timely motion by the accused. R.C.M. 707(e). Finally, a violation of R.C.M. 707 may be waived by a failure of the appellant to object at trial. R.C.M. 905(e).

At the outset, we note that the appellant's pleas of guilty to the unauthorized absence and the wrongful appropriation do not waive the speedy trial issue as to those charges. *See United States v. Davis,* 29 C.M.R. 226 (C.M.A.1960); *United States v. Lorenc,* 30 M.J. 619 (N.M.C.M.R.), *pet. denied,* 32 M.J. 1 (C.M.A.1990); *United States v. Angel,* 28 M.J. 600, 601 n. 1 (N.M.C.M.R.1989) (en banc); R.C.M. 905(e). Unlike *United States v. Sloan,* 48 C.M.R. 211 (C.M.A.1974) and *United States v. Demmer,* 24 M.J. 731 (A.C.M.R. 1987), the appellant raised the speedy trial issue at trial as to all charges and specifications.

The government has not presented us with sufficient facts for us to decide if the deployment of the defense counsel to the Sinai qualified as an "unusual operational requirement" or "military exigency." *See, e.g., United States v. Wactor,* 30 M.J. 821 (A.C.M.R.1990). Therefore, we base our holding on R.C.M. 707(c)(3).

We find that the appellant, aware that CPT S would probably not return until March, affirmatively consented to the delay after the military judge found that the delay would be a defense-requested delay. We hold that the

military judge did not err in ruling that the delay was a defense delay and in denying the appellant's motion for dismissal of charges based on a violation of his regulatory speedy trial rights.[3] The appellant's first assertion of error is therefore without merit.

The appellant also asserts that the evidence is legally and factually insufficient to prove his guilt beyond a reasonable doubt as to the two contested specifications of larceny. The unrebutted evidence at trial showed that two bank cards made out in the names of two soldiers in the appellant's unit were found among the appellant's own cards in a desk exclusively used by the appellant. The cards were found during a legitimate inventory of the appellant's property while he was absent without leave. The two soldiers whose names appeared on the cards testified that they had opened bank accounts and had asked for bank cards but had never received them. Further, there was evidence that the appellant frequently picked up the mail for his section. Utilizing the standards for legal and factual sufficiency set out in *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) and *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987), respectively, we find that the evidence circumstantially proves the appellant's guilt beyond a reasonable doubt.

The findings of guilty and the sentence are affirmed.

Senior Judge JOHNSON and Judge WERNER concur.

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[3] Because of our holding, it is unnecessary for us to determine in this case the appropriateness, correctness or legal significance of the military judge's comments regarding the Trial Defense Service's responsibilities in selecting this particular defense counsel for overseas deployment. We fully support the independent military defense bar as it has evolved in the Army. However, with that independence comes the responsibility of the Trial Defense Service to insure that existing attorney-client relationships and clients' rights are not jeopardized by operational requirements.

APPENDIX C

RULE FOR COURTS-MARTIAL 707

Rule 707. Speedy trial

(a) *In general.* The accused shall be brought to trial within 120 days after the earlier of:

(1) Notice to the accused of preferral of charges under R.C.M. 308; or

(2) The imposition of restraint under R.C.M. 304 (a)(2)-(4); or

(3) Entry on active duty under R.C.M. 204.

(b) *Accountability.*

(1) *In general.* The date on which the accused is notified of the preferral of charges or the date on which pretrial restraint is imposed shall not count for purpose of computing the time under subsection (a) of this rule. The date on which the accused is brought to trial shall count.

(2) *Inception.* If charges are dismissed, if a mistrial is granted, or—when no charges are pending—if the accused is released from pretrial restraint for a significant period, the time under this rule shall run only from the date on which charges or restraint are reinstituted.

(3) *Termination.* An accused is brought to trial within the meaning of this rule when:

(A) A plea of guilty is entered to an offense; or

(B) Presentation to the factfinder of evidence on the merits begins.

(4) *Multiple charges.* When charges are preferred at different times, the inception for each shall be determined from the date on which the accused was notified of pre-

ferral or on which restraint was imposed on the basis of that offense.

(c) *Exclusions.* The following periods shall be excluded when determining whether the period in subsection (a) of this rule has run—

(1) Any periods of delay resulting from other proceedings in the case, including:

(A) Any examination into the mental capacity or responsibility of the accused;

(B) Any hearing on the capacity of the accused to stand trial and any time during which the accused lacks capacity to stand trial;

(C) Any session on pretrial motions;

(D) Any appeal filed under R.C.M. 908 unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit; and

(E) Any petition for extraordinary relief by either party.

(2) Any period of delay resulting from unavailability of a military judge when the unavailability results from extraordinary circumstances.

(3) Any period of delay resulting from a delay in a proceeding or a continuance in the court-martial granted at the request or with the consent of the defense.

(4) Any period of delay resulting from a failure of the defense to provide notice, make a request, or submit any matter in a timely manner as otherwise required by this Manual.

(5) Any period of delay resulting from a delay in the Aritcle 32 hearing or a continuance in the court-martial at the request of the prosecution if:

(A) The delay or continuance is granted because of unavailability of substantial evidence relevant and necessary to the prosecution's case when the Government has exercised due diligence to obtain such evidence and there exists at the time of the delay grounds to believe that such evidence would be available within a reasonable time; or

(B) The continuance is granted to allow the trial counsel additional time to prepare the prosecution's case and additional time is justified because of the exceptional circumstances of the case.

(6) Any period of delay resulting from the absence or unavailability of the accused.

(7) Any reasonable period of delay when the accused is joined for trial with a coaccused as to whom the time for trial has not yet run and there is good cause for not granting a severance.

(8) Any period of delay, not exceeding 60 days, occasioned in processing and implementing a request pursuant to R.C.M. 204 to order a member of a reserve component to active duty for disciplinary action.

(9) Any other period of delay for good cause, including unusual operational requirements and military exigencies.

(d) *Arrest or confinement.* When the accused is in pretrial arrest or confinement under R.C.M. 304 or 305, immediate steps shall be taken to bring the accused to trial. No accused shall be held in pretrial arrest or confinement in excess of 90 days for the same or related charges. Except for any periods under subsection (c)(7) of this rule, the periods described in subsection (c) of this rule shall be excluded for the purpose of computing

when 90 days has run. The military judge may, upon a showing of extraordinary circumstances, extend the period by 10 days.

(e) *Remedy.* Failure to comply with this rule shall result in dismissal of the affected charges upon timely motion by the accused.

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